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may be either actual or constructive, there being a constructive breaking when an entrance has been obtained by threat of violence, by fraud, or by conspiracy, and an actual breaking where there is the application of some force, slight though it may be, whereby the entrance is effected, and may be the mere pushing open of a door, turning a key, lifting a latch or use of slight physical force.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 655.]

**2. Burglary (§ 9 (1)\*)—One Having Right to Enter Premises at Any Time Not Guilty of “Breaking.”**—One having the relation of companion and friend to the owner of a house, with the right to enter the premises at any time of the day or night, and to eat and sleep there whenever she pleased, was not guilty of a breaking, as an element of the crime of burglary, in entering the premises and taking money therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Breaking (In Criminal Law). For other cases, see 2 Va.-W. Va. Enc. Dig. 656.]

**3. Criminal Law (§ 1036 (8)\*)—Conviction Reversed on Point Raised First on Appeal.**—A conviction for burglary was reversed, where it appeared that the evidence did not show that accused was guilty of “breaking” into the house, though the point was not raised on the trial below.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 560.]

Error to Corporation Court of City of Newport News.

Annie Davis was convicted of burglary, and brings error. Reversed.

*W. R. Walker* and *J. Thomas Newsome*, both of Newport News, for plaintiff in error.

*Jno. R. Saunders*, Atty. Gen., and *Leon M. Bazile*, Asst. Atty. Gen., for the State.

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#### ELLETT v. COMMONWEALTH.

Jan. 19, 1922.

[110 S. E. 358.]

**1. Taxation (§ 93 (2)\*)—Property of Resident Held by Trustee Out of State Taxable.**—Where a citizen resident in the state has a life estate in choses in action held in trust by a nonresident trustee, they are taxable in the state, although they are not and never have been within the state.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 101.]

**2. Taxation (§ 414\*)—Choses in Action Held by Nonresident Trustee Properly Listed in Name of Life Tenant.**—A life estate in choses

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

in action, held in trust for a citizen resident of the state by a non-resident trustee, was properly listed and assessed in the name of the life tenant, instead of in the name of the trustee under Code 1904, § 492, as amended by Acts 1918, c. 99, especially where the income of the life tenant is in excess of the tax imposed.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 115.]

Error to Hustings Court of Richmond.

Action between Addie C. Ellett and the Commonwealth of Virginia. Judgment for the latter, and Ellett brings error. Affirmed.

*R. L. Montague*, of Richmond, for plaintiff in error.

*J. Vaughan Gary* and *E. Warren Wall*, both of Richmond, for the Commonwealth.

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BREEDLOVE *v.* HARDY.

Jan. 19, 1922.

[110 S. E. 358.]

1. **Animals (§ 44\*)—Wrongful Killing of Dog Actionable.**—By the common law, and also under Code 1919, § 2324, declaring dogs assessed with a license tax which is not delinquent to be personal property and the subject of larceny or trespass, an action is maintainable for the wrongful, unlawful, and intentional killing of a dog.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 375.]

2. **Animals (§ 44\*)—Burden on Defense to Show Justification for Killing Dog.**—In an action for the wrongful killing of a dog, where the proof of the killing is clear, the burden is on defendant, who justifies his action, to show the necessity therefor.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 344.]

3. **Animals (§ 84\*)—Dog May Be Killed in Defense of Domestic Animals.**—The owner of domestic animals or fowls has the right to defend them from injury through the attacks of dogs, but the extent of such right of defense necessarily depends on whether the right is reasonably exercised, so as to make it lawful and justifiable.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 374.]

4. **Animals (§ 85\*)—Justification for Killing of Dogs Held for Jury.**—Evidence that dogs had been disturbing plaintiff's turkeys every day or two during the whole summer, and that on a particular morning they drove the turkeys over on a neighbor's premises, and plaintiff followed with a gun and found them after the turkeys, though they had stopped chasing the turkeys when he got close enough to shoot, made a question for the jury whether a man of ordinary prudence would have been reasonably led to believe that it was necessary to kill the dogs to protect the turkeys.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 385.]